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Treasure-Trove--Lost Property--Merger of Treasure-Trove into Lost Property (Zech v. Accola et al., 33 N.W.2d 232 (Wis. 1948))

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the jury is presented.⁹ While, ordinarily, the answers to these questions would naturally fall within the province of the jury, and when made in their verdict, would be regarded as binding, yet where the facts are fairly incontrovertible, the question of proximate cause is for the court.¹⁰ In this regard, the question of proximate cause is not different from the question of negligence, or contributory negligence, in all of which, when the *facts* are conceded or found, the question is one of law.¹¹ The province of the jury is to find the *facts*, but once being found or conceded, it is the duty of the court to declare the law applicable to such *facts*.¹²

Therefore, in the present case, since the plaintiff failed to show a causal connection between the injury and the condition of the vestibule, the only remaining conclusion was that the accident was caused by plaintiff's own misstep and in such a case it is proper to take the question out of the hands of the jury and direct a verdict for the defendant.

J. J. L.

TREASURE-TROVE — LOST PROPERTY — MERGER OF TREASURE-TROVE INTO LOST PROPERTY.—The defendants were members of a church committee which had collected several bundles of rags. These rags were parcelled out to hired women to weave into rugs. The plaintiff was one of the women hired for this purpose, and in the bundle allocated to her she found \$2,100 in \$10 and \$20 bills. Plaintiff turned this money over to the defendants and advertised in the local newspaper in an attempt to find the true owner. The money was never claimed and the plaintiff requested the defendants to return it to her. Upon the defendant's refusal this action was brought for the restoration of the money. The defendants counterclaimed alleging that the plaintiff had forfeited her rights to the money by failing to comply with a statute¹ that set up certain requirements²

⁹ Atchison, T. & S. F. R. R. v. Toops, 281 U. S. 351, 74 L. ed. 896 (1930); Kalinowski v. Joseph T. Ryerson & Son, 242 App. Div. 43, 272 N. Y. S. 759 (4th Dep't 1934).

¹⁰ Goodlander Mill Co. v. Standard Oil Co., 63 Fed. 400 (C. C. A. 8th 1894).

¹¹ Traylen v. Citraro, 112 Cal. App. 172, 297 Pac. 649 (1931).

¹² Johnson v. Wofford Oil Co., 42 Ga. App. 647, 157 S. E. 349 (1933).

¹ The Wisconsin statute provides: "If any person shall find any money or goods of the value of three dollars or more and if the owner shall be unknown, such person shall, within five days after finding money give notice thereof in writing to the town clerk . . ." WIS. STAT. § 170.07 (1945).

² The statute also provided a penalty for non-compliance: "If any finder of lost money or goods of the value of three dollars or upward shall neglect to give notice of same and otherwise to comply with the provisions of this chapter he shall be liable for the full value of such money or goods, one-half to use of town the other half to person who shall sue for the same . . ." WIS. STAT. § 170.07 (1945).

as a prerequisite to a finder's rights to the property. *Held*, judgment affirmed on the ground plaintiff was entitled to the money as treasure-trove and therefore was under no compulsion to comply with the lost property statute. *Zech v. Accola et al.*, 253 Wis. 80, 33 N. W. 2d 232 (1948).

With the enactment of legislation in most jurisdictions,³ similar to the Wisconsin statute, the question of whether property found shall be deemed lost property or treasure-trove has become a vital one. The failure to comply with these lost property statutes often deprives the finder of his rights to the property;⁴ and in some jurisdictions a part of all property found enures to the municipality, city or state even where there has been a strict compliance with the statute.⁵ To bring property found under the law of treasure-trove it has to be gold or silver, coin, plate or bullion *purposely concealed for safe keeping*,⁶ and this rule of law has been extended to include their paper counterpart;⁷ whereas lost property is defined as any chattel that has been *inadvertently or involuntarily parted with*.⁸

This question has been complicated by some authorities advancing the view that this distinction no longer exists and the law of treasure-trove has been merged into the law of lost property,⁹ but the better view seems to be that in the absence of a statute accomplishing this result no merger can be presumed,¹⁰ for the common law developed recognized distinctions which have not been overruled. It has been held that the owner of land where treasure-trove is found has no title in the treasure by virtue of his ownership of the land;¹¹ but the owner of land where lost property has been found was declared to be the custodian of the property found for the true owner.¹² The death of the true owner of treasure-trove gives no rights in the treasure to his personal representative or heir;¹³ yet the personal representative of the owner of lost property has the same rights in the lost property that he has in the decedent's estate.¹⁴

The court dismissed the defendants' argument that the statute was broad enough to indicate an intent of the legislature to include both lost property and treasure-trove stating that the court may not so strain the words of the statute as to construe an intent that does

³ *Garramone v. Simmons*, 177 Misc. 330, 30 N. Y. S. 2d 465 (1941); *Danielson v. Roberts*, 44 Ore. 108, 74 Pac. 913 (1904).

⁴ See note 2 *supra*.

⁵ See Note, 36 C. J. S., Finding Lost Goods § 5 (1943).

⁶ *Huthmacher v. Harris's Administrators*, 38 Pa. 491, 80 Am. Dec. 502 (1861).

⁷ *Weeks v. Hackett*, 104 Me. 264, 71 Atl. 858 (1908).

⁸ *Ibid.*

⁹ *Danielson v. Roberts*, 44 Ore. 108, 74 Pac. 913 (1904).

¹⁰ *Zornes v. Bowen*, 223 Iowa 1141, 274 N. W. 877 (1937).

¹¹ See note 7 *supra*.

¹² *McAvoy v. Medina*, 11 Allen (93 Mass.) 548, 87 Am. Dec. 733 (1866).

¹³ *Vickery v. Hardin*, 77 Ind. App. 558, 133 N. E. 922 (1922).

¹⁴ *Baugh v. Williams' Administrators*, 264 Ky. 167, 94 S. W. 2d 330 (1936).

not appear to have been within the contemplation of the legislature. This holding appears to be sound for the Wisconsin statute does not even intimate that its purpose was other than to regulate the rights to that type of property deemed in law to be lost. Nor can there be any doubt that this money was purposely concealed for safe-keeping, or that the plaintiff has exercised complete good faith. There is little direct authority on the question of merger of treasure-trove into lost property, and generally it appears that the courts will uphold the rights of persons who can bring themselves under the established common law rule which distinguishes between treasure-trove and lost property, when they have acted in good faith, for the common law will not be lightly brushed aside by strained decisions or subtle technicalities.

H. B. E.

VENDOR-PURCHASER—RESTRICTIVE COVENANTS—MARKETABLE TITLE—SPECIFIC PERFORMANCE.—The vendor brought an action for specific performance of a contract for the sale of property situated in Asbury Park, N. J. The purchaser's defense was that the plaintiff was unable to convey a marketable title because of a restrictive covenant prohibiting the sale of liquor on the premises. The covenant dated back to 1875 and all the property in the vicinity was burdened with a similar provision by the common grantor. At the time of the contract liquor had been sold openly at the plaintiff's hotel for many years; also liquor was being sold by another hotel within one block, by three others within two blocks and by eight others within three blocks. *Held*, for the plaintiff. The "hazard of litigation" to which a purchaser must not be subjected depends upon the chances of successful attack as viewed by the court and does not include the remote possibility of an idle suit. *Casriel v. King*, — N. J. Eq. —, 58 A. 2d 269 (1948).

The purchaser of real property has a right to a marketable title which is reasonably safe against loss and attack.¹ "A marketable title is one that is free from a reasonable doubt concerning title."² This requirement must be distinguished from the objection that as a matter of fact, established by proofs, the vendor has no title at all, an objection which may be raised by either party and which will as a matter of law defeat an action of specific performance. In an action of specific performance by the vendor if there arises reasonable doubt concerning the title, the court without deciding the question regards the doubt as sufficient reason for not compelling the buyer to take the conveyance.³ "... a purchaser is not to be compelled to take prop-

¹ *Barger v. Gery*, 64 N. J. Eq. 263, 53 Atl. 483 (Ch. 1902).

² *Vought v. Williams*, 120 N. Y. 253, 24 N. E. 195 (1890).

³ *POMEROY, SPECIFIC PERFORMANCE* § 198 (3d ed. 1926).